Self-Determination for Non-Self Governing Peoples and For Indigenous Peoples: The Cases of Guam and Hawai'i

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Introduction

The people who inhabit nonself-governing territories (such as the five U.S.-flag territories and commonwealths) have a right to self-determination and self-governance under international law.[1] In addition, the indigenous peoples in these, and other, communities have rights under international (and domestic) law that are separate and [2] distinct from the rights of colonized peoples, and these rights of indigenous peoples also include rights of self-determination and self-governance.

These two separate claims to self-determination and self-governance may sometimes come into conflict, or appear to do so. The situation in Guam presents a clear example of this apparent conflict because (a) the people of Guam and (b) its indigenous inhabitants (the Chamorro people who currently make up about 45 percent of Guam's population) each have separate claims to exercise their rights to self-determination and self-government.

Similarly in Hawai'i, which was a nonself-governing territory of the United States from 1898 to 1959, the residents of the Hawaiian islands exercised their right to self-determination in 1959 when they voted to become a state, [3]and they are now a self-governing political community. But the Native Hawaiian population has never had an opportunity to exercise its separate right to self-determination and to reestablish itself as a self-governing autonomous native nation.

This article presents the governing international law principles regarding self-determination of nonself-governing peoples and compares these principles to the principles governing the rights of indigenous peoples. Examples from the laws of the United States and other nations with indigenous populations are also discussed briefly.

Background: Guam

Because of Guam's strategic importance, the unincorporated territory of Guam is "one of the oldest colonial dependencies in the world." [4]The Chamorro struggle to reclaim indigenous political and cultural control of the island of Guam has had a lengthy history. The colonization of Guam and its people has included 230 years of Spanish subjugation, three years of Japanese World War II occupation, and nearly a century of U.S. dominance. Since World War II, the island has housed a major U.S. munitions depot. The United States claims that a continued

U.S. military presence on Guam maintains the nation's status as a Pacific power, power that the United States considers crucial to its self-proclaimed role of maintaining "peace and stability" in Southeast Asia. [5]

The face of Guam and its people remain permanently altered from hundreds of years of foreign intrusion. The United States military currently claims a substantial percentage of

Guam's Chamorro homelands. And Chamorros, although still the largest single group, now constitute (in part because of U.S. immigration practices) less than half of the current island population. [6]

Although some historians have claimed that the Chamorros readily accepted early Spanish presence and religion, in fact, the Chamorros engaged in nearly 30 years of indigenous rebellions, 17 of which are commonly labeled the Spanish-Chamorro Wars. [7]The United States gained control over Guam in the 1898 Treaty of Paris wherein Spain ceded the island as a result of the Spanish-American War. The United States has maintained this "ownership" of Guam except for the short-lived Japanese occupation of the island during World War II.

Although the United States has been a strong advocate of decolonization in other parts of the world, progress towards self-government and self-determination for its territory of Guam has lagged. Chamorros petitioned for some fifty years before attaining U.S. citizenship and a Bill of Rights, which were finally granted to them in the Organic Act of 1950. Seventy years of U.S. military rule and president-appointed governors preceded the decision of Congress in 1968 finally to permit the people of Guam to elect their first full-term governor. An additional two years passed before the United States allowed Guam's citizens limited Congressional representation. Today, the island remains as a U.S. territory, and certain U.S. constitutional provisions still do not apply to Guam. [8]

Frustrated with the slow process of amending the Organic Act on a piecemeal basis, which was exacerbated by the unwillingness of Congress to deal with the question of Guam's relationship to the United States, islanders created the Guam Political Status Commission in 1973. What began as an effort to examine and improve Guam's relationship with the United States evolved later into "external" and "internal" self-determination movements.

The first "external" goal is to reclaim Guam's self-governing authority from the United States, which currently possesses plenary authority over the island and its people. The Guam Legislature later created the Commission on Self-Determination in May 1980, with the Governor as chairperson. This Commission has been tasked with providing position papers on the various status options open to Guam as well as with drafting a Federal Territorial Relations Act, which came to be called the Guam Commonwealth Act. [9]It was also empowered to hold plebiscites on the various status options available to Guam. In a 1982 plebescite, Guam residents selected Commonwealth over Statehood as the status option of choice by 73 percent. [10]

The second "internal" goal evolved during these years of political activity as controversial issues served to guide and refine indigenous causes. A small group of Chamorro activists petitioned the United Nations in the 1970s, advocating their right as Chamorros of Guam to indigenous self-determination. These activists saw Guam's quest for commonwealth status as a means to realize Chamorro rights and establish a less oppressive relationship for Guam with the United States. These efforts caused the Commonwealth Act to be revised with "a strong Chamorro imprint." [11] The proposed Commonwealth Act states in Article I, Section 103(a):

> The [U.S.] Congress further recognizes that Commonwealth does not limit the pursuit by the Chamorro people of any ultimate status which they may seek in their progress toward fulfillment of their inherent right of self-determination as expressed in Article 73 of the Charter of the United Nations and in United Nations Resolution 1514. [12]

Although many people of Guam interpret self-determination as an indigenous-only redress for historic wrongs, [13] the United States government through its Task Force [14]has

suggested that the Chamorro-only self-determination movement is unconstitutional. This perspective is insensitive to the rights of indigenous peoples under U.S. law and ignores the separate rights that they have been able to establish. [15]

The sluggish U.S. pattern of addressing the concerns of Guam's people continues. Eight years have passed since the Commonwealth Act was first introduced into the U.S. House of Representatives as a bill in 1988. This Act was again introduced to the House for the fifth time on February 24, 1995, this time as H.R. 1056. Guam's current Congressional Delegate, Robert A. Underwood, stated that the Guam Commonwealth Act was chosen as his first bill to the 104th U.S. Congress "because the resolution of political status must be the first priority of the federal government in its relations with Guam. And the desire to take our place as a new Commonwealth is the first and foremost goal of the representatives of the people of Guam." [16]

Ironically, Chamorros living in the Northern Marianas (which include Saipan, Rota, and Tinian) who had been under U.S. Trust Territory supervision and control for thirty years following the conclusion of World War II in the Pacific, have successfully negotiated their self-determination in a covenant with the United States, and are now the "Commonwealth of the Northern Mariana Islands."[17] Such action is particularly significant to Guam because the United States in a 1977 (formerly confidential) document adopted the position that the United States should negotiate a commonwealth agreement with Guam that would be "no less favorable than that concluded with the Northern Marianas."[18] Chamorros of the Northern Mariana Islands have certain political authority over their islands and are provided many benefits--such as control over immigration and freedom from certain federal laws--that are currently unavailable to the people of Guam.[19]

Despite the United States' "confidential" promise to Guam, despite the nearly 100 years of relations between Guam and the United States whereby Guam has provided strategic U.S. military benefits, and despite over 35 years of recognition of Guam by the United Nations as a nonself-governing territory with rights to self-determination, Guam's quest for political self-determination and indigenous self-determination remains unresolved. Guam's public and political atmosphere continue to evolve. Indigenous rights and Guam's drive for increased political autonomy have been common themes in the island's daily newspaper. Activists known for their strong indigenous rights stances were elected as senators in Guam's 1994 elections. As recently as March 1995, Guam Congressional Delegate Robert A. Underwood stated that it appeared to be time for Guam to change tactics in its quest for political and indigenous self-determination.

The International Law Principles Governing The Rights Of Colonized Peoples To Self-Determination And Self-Governance

The U.N. General Assembly adopted two resolutions in 1960[20] that recognize, in no uncertain terms, the right of all nonself-governing peoples to be free of "alien subjugation, domination and exploitation" and to exercise "the right to self-determination."[21] This right to self-determination includes the right to "freely determine their political status and freely pursue their economic, social and cultural development."[22] The second of these resolutions states:

> (a) that "self-determination" must be accomplished through "free-expression," *i.e.,* a "free and voluntary choice by the people of the territory concerned,"[23] and
>
> (b) that "self-government" must result in one of three possible political statuses: independence, free association, or integration with the metropolitan country. [24]

Both the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples[25] and the 1970 Declaration on Principles of International Law Concerning Friendly

Relations and Co-operation Among States in Accordance with the Charter of the United Nations[26] state that the right to self-determination is not necessarily a right to secede and that countries cannot be dismembered if they are allowing all their citizens to participate equally in governmental affairs. The key is whether the country allows the "people" seeking self-determination to participate in the political life of the nation in a nondiscriminatory basis.[27] Because the people of Guam do not have voting rights in the U.S. Congress and do not vote for the U.S. President, they do not meet this criterion and thus have the right to self-determination.[28]

It is sometimes argued that because the people of the Northern Marianas voted in 1975 to approve a covenant with the United States, [29]and because the people of the U.S. Virgin Islands[30] and Puerto Rico [31] have expressed their status preferences in referenda, that they have engaged in definitive acts of self-determination that foreclose their right to do so again at a later time.[32] The opposing and more persuasive perspective is that if the choice adopted is not one of [33] the three options endorsed by the U.N. General Assembly in Resolution 1541,[34] the people of these islands remain in a nonself-governing status and continue to have a right to self-determination so that they can become self-governing. [35]

Hawai'i's situation is different. Hawai'i has been a state in the United States since 1959, and the people of Hawai'i taken as whole are now self-governing. All of Hawai'i's many ethnic groups participate actively in its political life,[36] the people of Hawai'i are able to enact their own laws, and to participate in the enactment of U.S. laws. The Native Hawaiian people, on the other hand, have been deprived of their sovereignty and are entitled to reestablish an autonomous sovereign nation as indigenous people.[37]

For the people of Guam, their right to self-determination is clear, but they have been denied the opportunity to exercise this process. The people of Guam have indicated support for a commonwealth-type status, defined in their own specific way, [38] but the United States has thus far been unresponsive. The indigenous people of Guam--the Chamorros--also have a separate right to self-determination as the next section explains.

The International Law Principles Governing The Rights Of Indigenous Peoples To Self-Determination And Self-Governance

A. Defining "Indigenous People"

Indigenous peoples are found in many countries and have diverse cultures and historical situations,[39] making it difficult and inappropriate to adopt a rigid or uniform approach to dealing with all such people. The situation of indigenous communities that have long maintained contact with the dominant society but are nevertheless concerned with the right of self-determination cannot easily be compared with that of threatened forest-dwelling groups in remote areas of the world who are only now coming into contact with non-indigenous people.[40]

In one important sense, however, most indigenous peoples throughout the world do share a common experience. Most have suffered the imposition of, and abuse from, dominant societies, which in dealing with them have generally shown scant respect for their traditional cultures, lifestyles, land relationships, and social systems. In many instances, this imposition by dominant societies continues to occur today. [41]

Although agreement has not yet been reached on a universal definition of indigenous peoples, certain elements of such a definition appear to be acceptable to most people: [42]

- Preexistence--the population is descended from persons who were in an area prior to the arrival of another population.
- Nondominance--their cultural style does not dominate.

- Cultural difference--their culture is different from the dominant culture.
- Self-identification as indigenous--the people identify themselves and the group as indigenous.[43]

A composite definition incorporating these elements has been presented to the United Nations Commission on Human Rights by Jose Martinez Cobo, the Special Rapporteur, on the "Problem of Discrimination Against Indigenous Populations" for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities and the United Nations Working Group on Indigenous Populations (WGIP): [44]

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples in accordance with their own cultural patterns, social institutions and legal systems.[45]

Under this definition, the Chamorro people of Guam[46] would be classified as indigenous. By contrast, the residents of Puerto Rico and the Virgin Islands would not be viewed as indigenous peoples, because they are not linked with the "pre-invasion and pre-colonial societies that developed in their territories" even though they have experienced domination and do have distinct cultures which they wish to protect and preserve.

B. The Rights of Indigenous Peoples

Indigenous peoples are entitled to all the fundamental freedoms and human rights that are recognized and embodied in existing international instruments, which apply universally to all persons. These existing international human rights instruments do not, however, adequately respond to and protect the specific concerns of indigenous peoples.[47]

In 1971, the United Nations' Sub-Commission on the Prevention of Discrimination and Protection of Minorities appointed Jose Martinez Cobo as Special Rapporteur to study "discrimination against indigenous populations." The Martinez Cobo Study, with its conclusions and recommendations, was released in several stages until its completion in 1983, and it is now considered to be an accepted authority on the problems of indigenous populations.[48]

The conclusion of this study is that present international instruments are not "wholly adequate for the recognition and promotion of the specific rights of indigenous populations as such within the overall societies of the countries in which they now live." [49] The study also concluded that existing human rights standards are insufficient and inadequate because they are not fully applied to indigenous peoples.[50] This report gives particular attention to the right of indigenous peoples to "self-determination":

> Self-determination, in its many forms, must be recognized as a basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future …. [S]elf-determination constitutes the exercise of free choice by indigenous peoples, who must to a large extent create the specific content of this principle, in both its internal and external expressions, which do not necessarily include the right to secede from the State in which they may live and to set themselves up as sovereign entities. The right may in fact be expressed in various forms of autonomy within the State.[51]

Regarding the definition of the concept "indigenous," the study concludes that the

indigenous people themselves must be consulted about criteria (such as ancestry, culture, and language) that they consider valid, because it is their right to determine who is indigenous and who is not.[52] The study also identified special areas for urgent action, such as health, housing, education, language, culture, social and legal institutions, employment, land, political rights, religious rights and practices, equality in administration of justice, and legal assistance. [53]

C. ILO Convention No. 169

In 1989, the International Labor Organization (ILO) adopted the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169),[54] which has already been ratified by several countries. This treaty does not explicitly use the term "self-determination," but it includes many provisions that recognize the separate and distinct rights of indigenous peoples. Among these provisions are the following:

- Article 6(a) requires governments to consult with indigenous peoples "whenever consideration is being given to legislative or administrative measures which may affect them directly."[55]
- Article 6(c) requires governments to "establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose."[56]
- Article 7(1) recognizes the rights of indigenous peoples to decide their own destinies:

  > The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly. [57]

- Article 8(2) recognizes the right of indigenous peoples "to retain their own customs and institutions," so long as they are not incompatible with "internationally recognised human rights."[58]
- Articles 13-19 cover the rights of indigenous peoples to land and resources. Article 14(1) recognizes the "rights of ownership and possession" of indigenous peoples "over the lands which they traditionally occupy,"[59] and Article 14(2) requires governments "to guarantee effective protection of their rights of ownership and possession." [60] Similarly, Article 15(1) requires governments to safeguard the rights of indigenous peoples "to the natural resources pertaining to their lands."[61]

D. The Declaration on the Rights of Indigenous Peoples

While the International Labor Organization was sponsoring the drafting of this new treaty, the U.N. Economic and Social Council decided in 1982 to establish a Working Group on Indigenous Populations, which devoted its annual summer meetings to the drafting of a document for adoption by the General Assembly, which has been given the working title of "Draft Declaration on the Rights of Indigenous Peoples." The current draft of this document provides more detail than the ILO Convention regarding the rights to self-determination and autonomy of indigenous peoples. The working draft that is being considered [62]contains the following rights:

- Article 3 recognizes that "[i]ndigenous peoples have the right of self-determination, by virtue of that right they freely determine their political status and freely pursue

their economic, social and cultural development."[63]

- Indigenous peoples have the collective right to live in freedom, peace and security *as distinct peoples* and to full guarantees against genocide or any other acts of violence …."[64] Indigenous peoples have the right to be protected against "any form of assimilation or integration by any other cultures …."[65]
- Indigenous peoples have "the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such."[66]
- Indigenous peoples have "the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning."[67]
- Article 19 provides that indigenous peoples have the right to participate in all levels of decision-making on matters affecting them through representatives they choose in accordance with their own procedures, "as well as to maintain and develop their own indigenous decision-making institutions."[68]
- Indigenous peoples have the right to develop and maintain their own health, housing, and other economic and social programs through their own institutions.[69]
- Indigenous peoples have the right to recognition of their distinctive spiritual and material relationship with their lands and territories and with the total environment associated with their lands and territories. They also have the right to control, own, and manage their lands and territories.[70]
- Indigenous peoples have the right to autonomy in internal and local matters such as education, information, media, culture, religion, health, housing, employment, social welfare, land and resource management, and internal taxation. [71]

E. Domestic Initiatives

While these international developments have been underway, several nations have taken dramatic steps to recognize and protect the rights of indigenous peoples. In northern Canada, a land area the size of Texas has been recognized as being under the autonomous governance of the indigenous peoples of that region. In Australia, the *Mabo* court decision[72] has recognized the preexisting rights of the aboriginal peoples and has required the government to come up with a comprehensive approach toward the protection of these rights. In New Zealand, the Waitangi Tribunal has been adjudicating cases and returning lands and resources to the Maori people. In the United States, several tribal settlements returned lands to Native Americans. And on November 23, 1993, the United States Congress formally apologized to the Native Hawaiian people for the "participation of agents and citizens of the United States" in the "overthrow of the Kingdom of Hawai'i on January 17, 1893" and the resulting "deprivation of the rights of Native Hawaiians to self-determination."[73]

How Do These Principles Apply?

A. Guam

The Guam Draft Commonwealth Act,[74] if approved by Congress, would be an act of self-determination by the people of Guam, and Section 102(b) of that Act recognizes that all qualified residents of Guam have the right to participate in any referendum to be held on Guam's status.[75] At the same time, Section 102(a) of this Draft Act contains the following provision recognizing the separate right to self-determination of the Chamorro people:

> The Congress recognizes the inalienable right of self-determination of the

indigenous Chamorro people

- of Guam, defined as all those born on Guam before August 1, 1950, and their descendants. The exercise of
- such right of self-determination shall be provided for in a Constitution of the Commonwealth of Guam. [76]

Section 102(f) authorizes the establishment of a "Chamorro Land Trust," composed of lands now held by the federal government, which is designed to be for the benefit of "the indigenous Chamorro people of Guam."[77]

This Draft Act thus recognizes the separate claims of the people of Guam and the Chamorro people. These claims need not be in conflict, although the Chamorro people could seek an autonomous sovereign status that would give them authority over their own resources and activities. Whether they would be free from regulation by the government of Guam would depend on the nature of their autonomy as recognized by the United States Congress.

B. Hawai'i

In 1959, Hawai'i became the 50th state in the United States and is now fully integrated into the political life of the country. The indigenous people of Hawaiian ancestry nonetheless have a right to self-determination that remains unfulfilled. They are by logic and by law entitled to the same range of rights that other Native Americans have, including the right to an autonomous sovereign status.[78] Hawaiian groups are now actively involved in creating an autonomous sovereign Hawaiian nation and are developing strategies to receive more formal federal recognition. What form this sovereign nation will take will depend on the will and wishes of the Hawaiian people.[79]

C. Elsewhere

The contrast between the two types of self-determination is not seen as clearly in the other U.S. territories and commonwealths, but the distinction may still become important. All five of these island communities--Guam, the Commonwealth of the Northern Mariana Islands, American Samoa, Puerto Rico, and the U.S. Virgin Islands--are nonself-governing and the peoples of all these islands retain their right to self-determination.[80]

Section 805 of the Covenant establishing the Commonwealth of the Northern Marianas[81] states that only "persons of Northern Marianas descent" can acquire permanent and long-term interests in land. This recognition of the separate rights of the indigenous people of the Northern Marianas was accepted as legitimate by the U.S. Court of Appeals for the Ninth Circuit[82] in order to protect the native culture.[83]

The population of American Samoa is almost entirely Samoan, partly because the American Samoan government is entitled to control and limit immigration to the island[84] and partly because land ownership is tightly controlled by Samoan custom. If the population were ever to become more mixed, the Samoan people would be entitled to retain control over the land and to exercise their separate right to self-determination.

The peoples of the U.S. Virgin Islands and Puerto Rico do not have the status of indigenous peoples, but they nonetheless have the right to "enjoy their own culture, to profess and practice their own religion, [and] to use their own language," just as any minority group has under Article 27 of the International Covenant on Civil and Political Rights.[85] Although the meaning of the right to "enjoy" one's own culture has yet to be fleshed out, it must include the right to protect one's culture from being submerged by the dominant society, and to that extent may require some separate rights and some level of autonomy.

Conclusion

The right to self-determination is a powerful right that reflects the yearning of all peoples for recognition of their unique heritage and values. This right manifests itself in two distinct ways depending upon whether it is asserted by (a) a nonself-governing people or (b) an indigenous people. All peoples have the right to govern themselves, and all indigenous peoples also have this right. Nonself-governing peoples have the right to become self-governing either by:

(i) becoming independent

(ii) becoming integrated with their metropolitan power, or

(iii) becoming a freely-associated state with the metropolitan power.

Although indigenous peoples do not necessarily have the right to secede and become fully independent, they do have the right to enough autonomy and sovereignty to ensure that they are able to preserve themselves as a distinct cultural community and to make the fundamentally important decisions for themselves. By vigorously protecting this right, we can protect the inherent dignity of each group and ensure that the diversity of the world's populations will continue to enrich the lives of all peoples.

Authors

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Footnotes

[1] Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960); G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, Annexes, Agenda Item No. 38, at 9, U.N. Doc. A/4684 (1960). *See* Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands,* 14 U. HAW. L. REV. 445, 503-05, 510-16 (1992) [hereinafter Van Dyke, *Evolving Legal Relationships*].The five U.S.-flag territories and commonwealths are American Samoa, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, Guam, and the U.S. Virgin Islands.

[2] *See, e.g.,* GORDON BENNETT, ABORIGINAL RIGHTS IN INTERNATIONAL LAW (1978); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION 74-103 (1990); S. James Anaya, *Indigenous Rights Norms in Contemporary International Law,* 8 ARIZ. J. INT'L & COMP. L. 2:1 (1991); Russell Lawrence Barsh, *Indigenous Peoples: An Emerging Object of International Law,* 80 AM. J. INT'L L. 369 (1986); ; John Howard Clinebell & Jim Thompson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law,* 27 BUFF. L. REV. 669 (1978); Raidza Torres,

The Rights of Indigenous Populations: The Emerging International Norm, 16 YALE J. INT'L L. 127 (1991); Jon Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs,* 7 U. HAW. L. REV. 63, 89-90 (1985) [hereinafter Van Dyke, *Constitutionality].*

[3] Even this statement has been challenged, because the only options offered to the people of Hawai'i were (1) to become a state or (2) to remain a territory. Some have argued that the resolutions of the United Nations General Assembly cited *supra* in note 1 require that nonself-governing peoples be given the additional options of complete independence and free associated state status.

Another complaint that has been lodged regarding the 1959 vote in Hawai'i is that the immigration to Hawai'i of large numbers of non-Hawaiians denied the people of Hawaiian ancestry of their unique right to exercise self-determination in their native islands. Some General Assembly resolutions have criticized colonial powers who have allowed migration into a colony to overwhelm the indigenous population. Such migration certainly occurred in Hawai'i; in fact, it began even before the United States annexed the islands.

Although no clear principles have emerged regarding whether durational residency requirements can be imposed upon those who vote in a self-determination plebiscite, such requirements would appear to be appropriate to ensure that those voting are committed to being members of the political community seeking self-determination. The Matignon Accords, which have established a self-determination process for New Caledonia, call for a vote in 1998 in which only those persons who were residents of New Caledonia in 1988 will be allowed to participate.

[4] For a perspective on the right to self-determination in Hawai'i different from the views presented in this article, see Francis Anthony Boyle, *Restoration of the Independent Nation State of Hawaii Under International Law,* 7 ST. THOMAS L. REV. 723 (1995); *see also* S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs,* 28 GA. L. REV. 309, 334-36 (1994) [hereinafter Anaya, *Native Hawaiian People*].. Robert F. Rogers, *Guam's Quest for Political Identity,* 12 PAC. STUD. 49-70 (1988) [hereinafter Rogers, *Guam's Quest*]; Laura Souder-Jaffery, *A Not So Perfect Union: Federal-Territorial Relations Between the United States and Guam, in* CHAMORRO SELF-DETERMINATION 7-32 (L. Souder-Jaffery and L. & R.A. Underwood eds., 1987). *See generally,* Peter Ruffato, *U.S. Action in Micronesia as a Norm of Customary International Law: The Effectuation of the Right to Self-Determination for Guam and Other Non-Self-Governing Territories,* 2 PACIFIC RIM L. & POL. J. 377 (1993).

The present article does not contain a general background on Hawai'i's unresolved issues because this topic has been addressed frequently in earlier writings. *See, e.g.,* NATIVE HAWAIIAN RIGHTS HANDBOOK (Melody K. MacKenzie ed., 1991); Anaya, *Native Hawaiian People, supra* note 3; Karen Blondin, *A Case for Reparations for Native Hawaiians,* 16 Haw. B.J. 13 (Winter, 1981); Noelle M. Kahanu and Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview,* 17 U. HAW. L. REV. 427 (1995); Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective,* 8 ARIZ. J. INT'L & COMP. L. 2:77 (1991); Van Dyke, *Constitutionality, supra* note 2.

[5] *Report: U.S. to Remain Pacific Power,* PAC. DAILY NEWS, March 20, 1995, at 10.

[6] Rogers, *Guam's Quest, supra* note 4, at 273.

[7] Francis X. Hezel & Marjorie C. Driver, *From Conquest to Colonization: Spain in the Mariana Islands,* 23:2 J. PAC. HIST. 137 (1988).
[8] *See* Rogers, *Guam's Quest, supra* note 4.

[9] Guam Commonwealth Act, H.R. 98, 101st Cong., 1st Sess. (1989).

[10] Rogers, *Guam's Quest, supra* note 4, at 8.
[11] *Id.* at 59; R.F. Rogers, Guam's Commonwealth Effort: 1987-1988 (1988).

[12] Guam Commonwealth Act, *supra* note 9, art. I, § 103(a).

[13] *See* Chamorro Self-Determination (L. Souder-Jaffery and L. & R.A. Underwood eds., 1987).

[14] Federal Task Force Report On Guam's Commonwealth Act, *reprinted in* Pacific Sunday News, Aug. 6, 1989, at 2D.

[15] Because preferences for native peoples have been viewed as "political" rather than "racial" in nature, they do not trigger heightened scrutiny and are constitutional if they have a rational basis. Morton v. Mancari, 417 U.S. 535 (1974); *see generally* Van Dyke, *Constitutionality, supra* note 2, at 73-80. Preferences for "Indians" have been interpreted to extend to other native groups. *See, e.g.,* Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976); Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 640 P.2d 1161 (1982); Naliielua v. Hawaii, 795 F. Supp. 1009 (D. Haw. 1990), aff'd,940 F.2d 1535 (9th Cir. 1991) (unpublished opinion).

[16] Delegate Robert A. Underwood, Speech to the Speaker of the U.S. House of Representatives (Feb. 24, 1995) (manuscript on file at the office of Guam Delegate Robert A. Underwood).

[17] Hope A. Cristobel, *The Organization of People for Indigenous Rights: A Commitment Towards Self-Determination, in* CHAMORRO SELF-DETERMINATION 103-24 (L. Souder-Jaffery and L. & R.A. Underwood eds., 1987); Van Dyke, *Evolving Legal Relationships, supra* note 1, at 480-87.

[18] Richard H.J. Wyttenbach-Santos, *Guam's Past, Present, and Future: Time Is on Who's Side?, in* THE 14TH ISLAND CONFERENCE ON PUBLIC ADMINISTRATION: LIBERATION '44 GUAM 50 YEARS LATER 153-71 (J. Guthertz & D. Singh eds., 1994) (citing Memorandum from Fred M. Zeder II, Director of Territorial Affairs, Dep't of Interior, to Chairman, Special Comm. on Guam, Under Secretaries Committee, Jan. 5, 1977, declassified Dec. 31, 1985).

[19] Rogers, *Guam's Quest, supra* note 4; Van Dyke, *Evolving Legal Relationships, supra* note 1, at 505-10.

[20] Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* note 1; G.A. Res. 1541, *supra* note 1.

[21] Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* note 1.

[22] *Id.* at ¶¶ 1,2.

[23] G.A. Res. 1541, *supra* note 1.

[24] *Id.; see generally* Peter Bergsman, Note, *The Marianas, the United States, and the United Nations: The Uncertain Status of the New American Commonwealth,* 6 CAL. W. INT'L L. J. 382, 394, 400-02 (1976).

[25] Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* note 1,¶ 6.

[26] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. 1/8028 (1970).

[27] *Id.* The key language is found in the last paragraph of the section entitled "The principle of equal rights and self-determination of peoples":

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour.

Id., reprinted in 9 I.L.M. 1292 (1970).

[28] Van Dyke, Evolving Legal Relationships, supra note 1, at 510.

[29] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (set out under 48 U.S.C. § 1681 note (1987)), *reprinted in* 15 I.L.M. 651 (1976) [hereinafter CNMI Covenant].

[30] The people of the Virgin Islands voted in a status referendum in 1993 and approved continuing the current relationship.

[31] The people of Puerto Rico approved the compact that established the commonwealth relationship in the 1950s, *see* Van Dyke, *Evolving Legal Relationships, supra* note 1, at 472-80, and reaffirmed that decision by a 48% to 46% vote (over the option of statehood) in November 1993.

[32] Interview with Hurst Hannum, Professor, Fletcher School of Law and Diplomacy, Tufts University, in Medford, Mass. (Aug. 1992). The United States made this argument with regard to the Commonwealth of the Northern Marianas in a legal brief filed in March 1990 in the case of United States *ex rel* Richards v. Sablan, No. 89-16404 (9th Cir.), which is discussed in Van Dyke, *Evolving Legal Relationships, supra* note 1, at 485.

[33] G.A. Res. 1541, *supra* note 1.

[34] *See* Van Dyke, *Evolving Legal Relationships, supra* note 1, at 504, stating:

> Even if it could be established that the residents of the Marianas knowingly sought this subservient status, it would not comply with the requirements of international law, just as a contract in which a person agrees to become a slave of another would not be enforced in a domestic court.

[35] For example, a Native Hawaiian, John Waihee, was Governor of the State of Hawaii from 1987 to 1995.

[36] This loss was recognized explicitly by the U.S. Congress in the Apology Resolution, Pub. L. No. 103-150, 170 Stat. 1510 (1993), and by the Hawaii State Legislature in Act 359, 17th Leg., 1993 Reg. Sess., 1993 Haw. Sess. Laws 1009. This topic is analyzed in detail in Kahanu & Van Dyke, *supra* note 4.

[37] Some Native Hawaiians seek total independence from the United States as their ultimate goal. The "right of secession" under international law is a complicated one. Although the formula quoted from the 1970 Friendly Relations Declaration in footnote 27 *supra* remains the governing international law standard--forbidding secession of those "peoples" that have full rights of political participation--it must also be noted that secessions or separations have occurred in recent years and that the international community generally accepts such occurrences when they happen. Among the recent examples are the separation of Czechoslovakia into the Czech Republic and Slovakia, the separation of the Soviet Union into 15 new states, the separation of Yugoslavia into (at least) four new states, the secession of Eritria from Ethiopia, the secession of Bangladesh from Pakistan, and, earlier, the separation of Panama from Colombia. All of the new states created by these actions have been accepted by the world community. And Quebec continues to wrestle with whether it should secede from Canada.

We have also seen examples of mergers of states in recent years, including the merger of West and East Germany, the merger of North and South Yemen, the creation of the European Union, and the merger of the Northern Mariana Islands with the United States.

From this amalgam of state-practices, it appears that no clear norm has emerged, and that each claim to the right of secession must be evaluated on its own facts. *See generally* Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede,* 13 CASE W. RES. J. INT'L L. 257 (1981).

[38] Van Dyke, *Evolving Legal Relationships, supra* note 1, at 488-91.

[39] *See* INDEPENDENT COMMISSION ON INTERNATIONAL HUMANITARIAN ISSUES, INDIGENOUS PEOPLES: A GLOBAL QUEST FOR JUSTICE 11 (1987) [hereinafter A GLOBAL QUEST].

The number of indigenous people varies greatly depending on the definition one adopts. It is frequently estimated that there are 200 million indigenous people in the world totaling approximately four percent of the global population. They live in all continents and in rich and poor countries. They cut across ideological and regional frontiers.

[40] *See* Jose Martinez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations,* U.N. Doc. E/CN.4/Sub.1983/21/Add.1, at 2 [[[hereinafter *Martinez Cobo Study*]. This study was conducted by Jose Martinez Cobo between 1971 and 1982 and was published in 1982 and 1983.

[41] See BENNETT, supra note 2, at 1-3. See also Martinez Cobo Study, supra note 40, at 2.

[42] *See* A GLOBAL QUEST, *supra* note 39, at 5-8.

[43] *See* U.N. Doc. E/CN.4/Sub.2/1986/7. Even these elements may not always apply; the native Fijians do, for instance, dominate in many senses over the Fiji Indians and other

ethnic groups in Fiji, even though they are a numerical minority.

[44] The Commission on Human Rights is an intergovernmental body based on Article 68 of the U.N. Charter, which serves as the central policy organ in the field of human rights. Much of the Commission's activity is initiated by working groups or other arrangements. The Commission annually establishes a working group to consider situations of alleged gross violations of human rights referred to it by its Sub-Commission under the Resolution 1503 procedure.

The Sub-Commission on Prevention of Discrimination and Protection of Minorities was established by the Commission on Human Rights pursuant to Resolution 9 (II) of the Economic and Social Council with powers inherently deriving from the U.N. Charter and is composed of people serving in their individual capacity. The Sub-Commission has established relevant working groups on communications, slavery, and indigenous populations with powers in the nature of investigation and recommendation.

The creation of the Working Group on Indigenous Populations (WGIP) was proposed by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in its Resolution 2 (XXXIV) of September 8, 1981. This Resolution was endorsed by the Commission on Human Rights in its Resolution 1982/19, March 10, 1982, and authorized by ECOSOC in its Resolution 1982/34 of May 7, 1982.

The WGIP was established in 1982 and has convened periodically to evaluate existing worldwide situations concerning indigenous populations. Since 1985, the WGIP has met for the additional purpose of formulating an indigenous rights declaration which will ultimately lead to a formal General Assembly declaration. *See infra* notes 62-71 and accompanying text.

[45] See Working Group on Indigenous Populations Report, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, ¶ 379.

[46] Section 103 of the Guam Draft Commonwealth Act, *supra* note 9, defines “the indigenous Chamorro people of Guam” as those who are “born on Guam before August 1, 1950, and their descendants.” This definition is thus not literally a racial classification, but rather a political classification, referring to those individuals who historically are linked to the pre-colonial Chamorro islanders and who lived on Guam during the period of total U.S. control, and their descendants.

[47] *See Working Group on Indigenous Populations Report,* U.N. Doc. E/CN.4/Sub.2/1985/22, at 14, ¶¶ 58, 60, 61.

[48] Interview with Erica Irene A. Daes, Professor of Law, University of Florence, Italy, in Honolulu, Hawai'i (July 1987). Professor Daes has been the Chairperson of the United Nations Working Group on Indigenous Populations and the Sub-Commission for the Prevention of Discrimination and the Protection of Minorities.

[49] *See Martinez Cobo Study, supra* note 40, Add.8, at 1.

[50] Id.

[51] *Id.* at 74, ¶ 581.

[52] *Id.* at 48-49, ¶¶ 362-82.

[53] *Id.* at 54-78.

[54] Convention Concerning Indigenous and Tribal Peoples in Independent Countries, International Labor Organization Convention 169, June 27, 1989, 28 I.L.M. 1382 (1989).

[55] *Id.* art. 6(a).

[56] *Id.* art. 6(c).

[57] *Id.* art. 7(1).

[58] *Id.* art. 8(2).

[59] *Id.* art. 14(1).

[60] *Id.* art. 14(2).

[61] *Id.* art. 15(1).

[62] Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1993/29, Annex I, at 50 (1993).

[63] *Id.* art. 3. The U.S. observer to the 1993 meeting, Kathryn Skipper, sought to make clear that this right does not necessarily include the right to secede from a nation by saying that self-determination can be achieved "through arrangements other than independence. The United States could not accept this inclusion of self-determination as applying specifically to indigenous groups if it implies or permits full independence generally recognized under international law." *U.S. Concerns About the Draft Declaration,* KE KIA'I, Sept. 1, 1993, at 1 (a publication of the Native Hawaiian Advisory Council, Honolulu, Hawai'i).

Other governments also voiced concern with the phrasing and intent of the provision recognizing the right of indigenous peoples to self-determination. During the 1992 session, for instance, Canada's representative stated that Canada could support the inclusion of the right to self-determination provided that it be understood that the right of self-determination is exercised a) within the framework of existing nation-states, and b) in a manner which recognized an interrelationship between the jurisdiction of the existing State and that of indigenous communities, where the parameters of jurisdiction were mutually agreed upon.

U.N. Doc. E/CN.4/Sub.2/1992/33, ¶¶ 64-65 (1992). The delegate stated that governments wanted to avoid wording in the draft declaration that might be misconstrued "as protecting the right of indigenous peoples to independence as a separate State." *Id.* Australia's representative supported the inclusion of a reference to the right to self-determination, because the recognition of such a right would assist indigenous peoples "to overcome the barriers to full democratic participation in the political process by which they are governed," and also noting that the notion of sovereignty had evolved in such a way that the world "had witnessed the emergence of the view that there might be ways in which the right of self-determination could be legitimately exercised short of the choice of separate status as an independent sovereign state." *Id.* ¶ 66.

Erica Daes, Chairperson of the Working Group on Indigenous Populations, summarized the discussions by saying that the term "self-determination" was used in the Draft

Declaration "in its internal character, that is short of any implication which might encourage the formation of independent states." *Id.* ¶ 67.

See generally Don Betz, *The Past is Prologue: Indigenous Peoples Take International Center Stage in 1993* (presented to the Sovereignty Symposium VI, Tulsa, Oklahoma, June 7-10, 1993).

[64] Draft Declaration on the Rights of Indigenous Peoples, *supra* note 62, art. 6 (emphasis added).

[65] *Id.* art. 7(d).

[66] *Id.* art. 8.

[67] *Id.* art. 15.

[68] *Id.* art. 19.

[69] *Id.* art. 23.

[70] *Id.* art. 25-26.

[71] *Id.* art. 31.

[72] Mabo v. Queensland, 66 Austl. L.J. Rep. 408-99 (1992); *see* ESSAYS ON THE MABO DECISION (Law Book Company ed., 1993); Anthony Bergin, A Rising Tide of Aboriginal Sea Claims: Implications of the Mabo Case in Australia, 8 INT'L J. MARINE & COASTAL L. 359 (1993).

[73] Joint Resolution, 100th Anniversary of the Overthrow of the Hawaiian Kingdom, Pub. L. No. 103-150, 170 Stat. 1510 (1993).

[74] Guam Commonwealth Act, *supra* note 9. The "commonwealth" created by this Draft Act would be one in which the United States authority could be exercised only with the "mutual consent" of the Guam government. *Id.* §§ 103, 202. The relationship thus created is closer to one of free association than the commonwealth relationships now found in Puerto Rico and the Northern Marianas. *See* Van Dyke, *Evolving Legal Relationships, supra* note 1, at 488-91.

[75] Guam Commonwealth Act, *supra* note 9, § 102(b).

[76] *Id.* § 102(a).

[77] *Id.* § 102(f).

[78] See generally Van Dyke, Constitutionality, *supra* note 2.

[79] The Hawaiian Sovereignty Elections Council is described in Kahanu & Van Dyke, *supra* note 4, at 451-53.

[80] See Van Dyke, *Evolving Legal Relationships, supra* note 1.

[81] CNMI Covenant, *supra* note 29.

[82] Wabol v. Villacrusis, 898 F.2d 1381 (9th Cir. 1990), as amended,908 F.2d 411,*as amended,*958 F.2d 1450,*cert. denied sub nom.* Philippine Goods, Inc. v. Wabol, 113 S. Ct. 675 (1992).

[83] *Id.* at 1392.

[84] *See* Arnold H. Leibowitz, Defining Status 447-51 (1989).

[85] International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 368 (1967). 18 U. Haw. L. Rev. 623

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